No. 98-0201

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term 1997 [sic 1998]

PATRICIA KOCH, JOHN LUPI, TERRY ADAMS, BARBARA KERTIS, MARY MAGAW, HAROLD ETSELL, JR., BERNARD DEVLIN, DAVID LEE, SALVATORE ILLUZZI,

Petitioners

vs.

GEORGE JAMES, WILLIAM BLANCHE, WILLIAM DUNKIN, DAVID SINGLES, MARK BETTNER, CHARLES KELLY, JR., KEVIN KELLY, HENRY BUCHHHOLZ, JESSE CARTER, ALAN KING,

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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EDITOR'S NOTE

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PARTIES TO THE PROCEEDING

The Petition for Writ of Certiorari omits the Chichester School District as a party/original Defendant since the May 19, 1998 special election took place, new representatives were seated and the Chichester School District, through the undersigned as the newly appointed solicitor, petitioned the District Court to realign as a Plaintiff in the proceedings. The Chichester School Board voted to withdraw all appeals and proceedings being pursued by the former school board members.

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STATEMENT OF THE CASE

A. Procedural History

This action was brought in November 1996 under 42 U.S.C. Section 1983 and for Declaratory Judgment under the First Amendment, Free Association Clause and the Fourteenth Amendment, Equal Protection Clause to the United States Constitution by citizens of the United States and voters/candidates seeking to run for office, support candidates in office and contending that the representation under the existing nine (9) region plan for the Chichester School Board was unconstitutional. The citizens also seek rescission of certain premature, unwanted obligations imposed upon the school district during the course of a 1996 state proceeding (hereinafter "DiMarco" action) to reapportion the school board under the Pennsylvania School Code.[1] The DiMarco action was not a class action, statutory jurisdiction based upon the electoral signatures was by stipulation between the attorneys and did not involve the federal Plaintiffs. The action was settled using a three (3) region plan combining the older less populous areas of Upper Chichester with large areas of the remaining municipalities in two (2) of the three (3) regions, based upon 1990 census figures, as 1990 census figures had been the only basis for population pleaded or used in that state proceeding. The DiMarco settlement was to *begin* to be implemented in November 1999. The plan was to be phased in so that all new representation would not *begin* to take effect until the year 2002.

As is clearly reflected by an overwhelming federal record, neither the undersigned nor any of the Respondents before this Court had an opportunity to make a decision in the DiMarco matter as none were parties nor represented by the attorneys in that case. Some of us sat among the audience during the hearing. While Buchholz helped to raise much of the money for the DiMarco case, Buchholz did not control it.

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[1] In April 1996 Joseph DiMarco brought a state action to reapportion the school board at-large under the Pennsylvania School Code based upon the 1990 census. In May 1996, the former board voted "to resist and defend" the DiMarco action. In June 1996 the former board voted to maintain nine (9) regions but to move one (1) seat from Marcus Hook to Upper Chichester. The state trial court granted the plan of the former board. Di Marco appealed. In February 1997, the stated vacated and remanded. DiMarco and the former board settled the matter without input from the federal plaintiffs or their counsel.

In the 1960s, Upper Chichester Township, Lower Chichester Township, Marcus Hook and Trainer were combined to form the Chichester School District under a nine (9) region plan with votes apportioned 4, 2, 2 and 1, respectively. At inception, Upper Chichester comprised about 51% of the district population. Since, Upper Chichester grew to comprise 64% of the population in 1990 and approximately 67% of the population today. The trial contentions revolved around *where* inside Upper Chichester the population grew, i.e. in which of the internal five (5) Upper Chichester Wards. The contentions were never whether Upper Chichester grew or by how much overall.

Prior to the filing of the DiMarco action, there had been prior legal actions and several motions made to the former board to realign itself voluntarily in accordance with population shifts. Significant population shifts had occurred since the 1960's well known to the former board members, and the deviations between the population under the nine (9) region system were in excess of 160% by 1990. Those motions to realign and prior lawsuits failed before the former board members (Petitioners here) on a number of occasions.

DiMarco's action sought to realign the School Board under the Pennsylvania School Code according to the 1990 census numbers. The instant matter was filed by other Chichester residents for realignment under the Constitution basing that alignment on the substantial growth within one (1) municipality, i.e. Upper Chichester, and the stagnation or reduction in population in the remaining three (3) municipalities, i.e. Marcus Hook, Trainer, and Lower Chichester through today.

On July 30, 1997 the Citizens moved for injunctive relief and summary judgment on the declaratory judgment action as well as the civil rights claims to which the former board responded on August 15, 1997 and cross-motioned. The Citizens filed their response to the cross-motions. The Citizens submitted with both the original motion as well as their response to the cross-motion literally boxes of supportive evidence establishing the prolonged tenure of the Petitioners violated the United States Constitution. The District Court held argument in September 1997.

At the argument, the District Court had before it notebooks of evidence including deposition testimony, affidavits, aerial photographs, population studies, school district documents, reports by population experts, census information, journals and other publications establishing the district population and substantial growth in Upper Chichester. Each of the instant Petitioners resides in the area and testified about the growth through 1997. While the District Court did not take

testimony at the hearing it had more than sufficient evidence upon which to base its grant of summary judgment in favor of the Citizens.[2] Not one fact or expert witness in discovery or at the hearing testified that there was no growth in Upper Chichester since 1990. Petitioners' "expert" actually showed more growth in Upper Chichester than did the Plaintiffs'/Respondents' expert.

With its decision of September 10, 1997, the District Court directed the parties submit Electoral Plans on or before December 1, 1997, with a special election for all nine (9) school board seats at or before the time of the May 1998 primary.

The former school board ignored the District Court directives, refused to meet with the Citizens and did nothing to exchange information to determine the bases upon which the school board would accept or be proposing a plan. Respondents continued to publish to the entire school district accusations about each of the Federal Plaintiffs by name in all school publications, while never so publishing about any other prior litigation ever.

While the undersigned was in the audience at the November 18, 1997 regular school board meeting, the former school board members without warning announced their plan. The very next day, and only a week before the federal submission deadline, the former school board members then filed and served by armed sheriff ex parte, also that day, a lawsuit against each and every Respondent before this Court. The former school board sought emergency state hearings and to preclude any decision by the District Court on the plans it was expecting to see on or before December 1, 1997.[3]

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[2] At no time did the former school board members request the opportunity to present further evidence.

[3] This was one of many attempts by the former school board, which continue to date, to usurp the jurisdiction of the District Court as the former school board was under a continuing federal order and direction to submit plans to the District Court. In an effort to subvert the District Court jurisdiction, bar the citizens' federal claims, delay implementation of constitutional representation and force a State Court to decide the abstention, mootness, claim and issue preclusion, etc., defenses asserted by the former school board, the former school board filed a separate lawsuit. The District Court stopped short of holding the former school board in contempt. The current Chichester School Board has instructed that that petition be withdrawn and/or the motion to dismiss that petition filed by the undersigned simply be granted.

The former school board then delayed the scheduled federal hearings to present evidence on a new plan. Eventually, a hearing was held in the District Court for January 8, 1998 and January 12, 1998. There was no limit to the issues for presentation. The District Court accepted any and all evidence offered by the former school board members, but the Petitioners offered no evidence or cross-examination on their affirmative defenses.

At the hearing, the superintendent/defendant in the District Court proceedings, Salvatore Illuzzi, acted as expert for the former school board who supported the administration's policies and programs, trying to determine population levels, design voting regions, and/or support claims for a new election plan. The former school board presented one (1) plan to the District Court by the December 1 deadline without any documentation, expert reports or evidence. The Petitioners supplemented weeks later and a few days prior to the hearing which they had delayed with two (2) other plans, changing population levels (for the fourth time) anticipated to exist in 1997. On the day of the hearing of January 8, 1998, the former school board submitted expert reports for the very first time as to what would substantiate their electoral plans and again redetermined population.

The Citizens, on the other hand, timely submitted a three (3) inch notebook of evidence on a primary and alternate plan with expert reports, depositions, demonstrative items and affidavits reflecting the development of and support for the plan which the District Court ultimately chose.[4] The Citizens' Plan determined through expert analysis of census data, real estate studies, tax records, photos, aerials, etc., that the current population of the school district has shifted and grown such that Upper Chichester contains 66.6% of the district population. The Plaintiffs then divided that population within two (2) of three (3) regions,

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[4] In February 1998, the former school board filed another state proceeding. The subsequent State Court proceeding also selected a plan submitted by the Citizens, similar to the pla. chosen in the District Court and with significant substantiation. It should be noted that the reproduced record in the Court of Appeals and the record before the District Court (being more voluminous) was four (4) volumes long. Additionally aerial photographs were submitted and notebooks worth of tax records, real estate studies photographs and videos were submitted. The population shifts and growth were extremely well documented as is apparent by the statements made by the District Court, the State Court , and also the Third Circuit.

being halves of Upper Chichester, and the third region being the remaining municipalities combined.[5]

The District Court allowed the former school board to submit a State Court petition for approval of one of the Citizens' Plans as submitted in the District Court or something substantially similar to one of the Citizens' Plans. The former school board members, again, in an attempt to thwart District Court jurisdiction, submitted to the state court the exact same plans it had already tried before the District Court and then one (1) additional plan. The former school board attempted to and did relitigate its entire case before the State Court Judge, despite rejection in federal court a few days earlier.

The Citizens submitted to the state court a modified version of the Citizens' first plan as submitted to and selected by the District Court. The case tried in state court in 1998, where the Citizens ultimately prevailed again, but which divided Ward 5 instead of Ward 1 of Upper Chichester. The State Court agreed. Under the plan chosen by the State Court on March 13, 1998 (Appendix 1), the May elections were held and a new, constitutional and representative board has been seated.

B. Chronology

The Chichester School District contains just shy of 27,000 people as of July 1, 1997. In 1967, when this nine (9) region system of representation for the school board was established, Upper Chichester Township contained approximately 51% of the population. Despite that population level, Upper Chichester received only four (4) of the nine (9) seats for representation. Since 1967, Upper Chichester Township has continued to grow while Marcus Hook has diminished in population and Lower Chichester and Trainer have essentially remained the same. By 1990 Upper Chichester Township contained approximately 64% of the population of the school district. That information was reflected upon numerous Chichester School District documents in the possession of and used by members of the former board and Petitioners in this case.

Despite those population shifts and despite the tension failure of representation was creating within the school district, the former board members repeatedly refused to reapportion the school board seats to reflect the principle of "one person, one vote". In February of 1996 and in several attempts after that

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[5] Upper Chichester has five (5) wards. Expert analysis was used to divide the population of one (1) of the wards of Upper Chichester, so that all the regional populations came within fractions of a percent to the mean of 8314 people per region.

meeting, one of the school board directors attempted to move for voluntary reapportionment. The former school board members (current Petitioners) resisted all such efforts and subsequently fought a lawsuit filed by Joseph A. DiMarco a citizen of Upper Chichester in April of 1996. There was substantial resistance by these Petitioners to achieving a constitutional voting system. See, e.g., Vigo County Republican Central Comm. v. Vigo County Commissioners, 834 F.Supp. 1080 (S.D. Ind. 1993); and Appendix "2", Order and Opinion of The Honorable John P. Fullam of 3/4/98. The actions should be viewed with serious concern.

During the DiMarco proceedings, the former school board members eventually cross-petitioned to change the least amount of representation at the latest possible date, i.e. moving one (1) of the seats from Marcus Hook and assigning it to Upper Chichester, without any concern for equality or proper representation. With this proposal the former school board cross-petitioned in state court. Although Upper Chichester had 2/3rds of the population, that was not to be reflected in the new school board's cross-petition. In August of 1996 that plan was approved by the state court, subsequently appealed by Mr. DiMarco and his attorneys. The Commonwealth Court of Pennsylvania vacated that decision in February of 1997. Ultimately, the former school board members and Mr. DiMarco's attorneys settled the matter on the 1990 United States Census figures by dividing the older smaller portions of Upper Chichester and combining them with large segments of Marcus Hook and Trainer, and with Lower Chichester in two (2) of the three (3) regions. In this fashion, the former board member constituencies and supporters of the superintendent could outvote the older portions of Upper Chichester wards and maintain control. Plainly and simply, the settlement reached by DiMarco and the former school board members was gerrymandering.

Mr. Buchholz, as President of QUEST (a volunteer group), promised to assist Mr. DiMarco in bringing his state court suit. Mr. DiMarco was the only party to that suit. Mr. Buchholz assisted Mr. DiMarco in obtaining funds for that suit, by publishing to and meeting with members of the community the status of the lawsuit. The remaining eight (8) federal plaintiffs had little, if any, contact with QUEST or knowledge of DiMarco.

QUEST had existed for several years, published newsletters, held meetings and debates on various topics important to education and the Chichester School District. There were several officers of QUEST, and QUEST performed many functions including communicating with the public generally under the words "We the People". That is to say, ordinarily any newsletter or article that issued from QUEST addressed the readers as "we". In the context of Mr. DiMarco's suit,

QUEST again used "we" in attempts to include the community in an effort to gather support from Mr. DiMarco in funding his attorneys and litigation costs.

Mr. Buchholz did not take any legal action in state court and did not retain an attorney. Mr. DiMarco hired his attorneys, made all decisions and appeared at the state hearings. The record is replete with proof that the state court suit was brought by, for and on behalf of Mr. DiMarco alone and that Mr. Buchholz as well as the remaining eight (8) federal Plaintiffs are not privies at all, no less enough such that their constitutional rights should be forfeited.

All Plaintiffs in the Eastern District of Pennsylvania testified they had no relationship to or knowledge of the DiMarco lawsuit or Quest. Some did not even read about it in the newspaper. Since there were just short of a dozen Plaintiffs in the federal action, even if Mr. Buchholz were considered a privy of Mr. DiMarco, then the remaining Plaintiffs in the Eastern District as supported by substantial materials presented to both the District Court as well as the Third Circuit Court of Appeals to find that the parties were different. The 1996 DiMarco case and this one were not preclusive.

Mr. Buchholz did not "conceive, fund or hatch" any plan, a phrase favored and perpetuated only in argument by the attorneys for the former school board members and not supported in the record now examined by several courts. The undersigned counsel also did not have any part in the DiMarco proceedings also evident from the record. The efforts of the undersigned have only been in the federal court proceedings, as is clear from the record presented to the District Court and reviewed by the Third Circuit Court of Appeals. The discussion of the Petitioners is a fact sensitive analysis and argument inappropriately made on a Petition for Writ of Certiorari.

The record does not support that Mr. Frattarelli asked permission of the undersigned or sought the undersigned's legal opinion nor does the record support Buccholz as an individual exercised control over the DiMarco matter. In fact, the record appears contrary, i.e. that DiMarco's lawyer advised as a courtesy the undersigned of what his settlement decision was because the undersigned had been an amicus.[6]

At one of the DiMarco hearings, the record reflects Mr. Buchholz testified as to implementation after the settlement by the parties. Mr. Buchholz was asked

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[6] All arguments made by the undersigned as an amicus were ignored by the Commonwealth Court in a footnote on page 13 of the Commonwealth Court opinion.

to testify because he is a school board director, has given numerous speeches across the Chichester School District, and is often more in touch with the community than would be other witnesses. The only issue about which Mr. Buchholz was asked at the time of the hearing was whether he thought the community would understand the tri-regional change for implementation with the 1997 election rather than waiting until 1999. The former school board members wanted to wait to *begin* to implement that plan until November of 1999, and only then by phasing in a few seats, the last of the seats would include Upper Chichester with elections in November of 2001. In other words, the former school board members at the time of the 1997 hearing insisted the implementation of the tri-regional settlement be based upon all of the population data not reflecting population today in Upper Chichester and not representing those individuals moving into the area since 1990 until November 2001. The undersigned attended the hearing before Judge Battle and sat in the audience as did a number of people. The undersigned was not asked for her opinion nor did she work at any time as co-counsel with attorneys for Mr. DiMarco. This is all record sensitive information, properly decided upon by the District Court and reviewed by the Appellate Court.

As The Honorable John P. Fullam stated in his opinions, the DiMarco case involved different parties and was settled. At no time did the federal Plaintiffs generally or the undersigned particularly have input into the manner in which the suit proceeded or was settled. The federal suit filed in the Eastern District of Pennsylvania attacked a number of issues, but included a claim for reapportionment under the rights of free association as well as equal protection and to be based upon current population levels. The voluminous files before the District Court, and later before the State Court in 1998, were literally pounds of record evidence establishing the significant growth of Upper Chichester as one (1) of the five (5) most growing townships in Delaware County, Pennsylvania in the 1990's.

By anybody's calculations, including that of Defendant Illuzzi who functioned as the expert for the former school board members in the lower court, Upper Chichester population was at least 2/3rds of the population of the school district. Defendant Illuzzi's numbers were slightly higher for Upper Chichester than the numbers calculated by the Plaintiffs' population and demographics expert. Apportioning 2/3rd and 1/3rd of the population into three (3) equal regions was not an arduous or legally complex task.

The Respondents before this Court presented expert testimony as well as significant substantiation for the population growth, shifts and/or current population location; only a portion of those calculations were based upon United

States Census Bureau estimates, otherwise confirmed and verified through other evidence and methodologies. The former school board members offered in their case the testimony of their own Defendant superintendent as the primary expert, originally hired by the former school board members to run the school district and now to calculate population levels from scratch, i.e. ignoring census bureau, and calculating from building permits by using a variety of irrational multipliers. The District Court accepted the Plaintiffs' expert testimony and criteria for determining the levels and the locations of current population. The State Court did also, rejecting also Defendant Illuzzi's analysis.

The Petitioners insert into their request for certiorari information not particularly relevant to the grant of a Writ of Certiorari, including that the undersigned and Buchholz were involved in the resolution of the DiMarco litigation. The record clearly reflects this was not the case. Additionally, the former school board members expound upon interim pretrial and discovery motions filed by the Citizens. While it is of questionable relevance on a petition for certiorari what occurred in discovery, it is specifically denied that the motions and/or the Citizens were unsuccessful. The citizens accomplished the first constitutional election and fair representation for the Chichester School District in over thirty (30) years.[7]

There is no record evidence whatsoever to suggest that the "three other individuals" elected on May 19, 1998 and James Squadrito, not a Plaintiff in the federal matter, were in any way related to either the state court proceeding or the federal court proceeding and certainly were not in privity with one or the other. To make such a statement to this Court is improvident, at best. In any event, Koch and Magaw were elected under the new tri-regional system as were four (4) additional members not here at issue.

REASONS FOR DENYING THE WRIT

Rule 10 of the United States Supreme Court Rules provides that a Writ of Certiorari is ordinarily issued where a decision was rendered by a Court of Appeals which is in conflict with a decision of another Court of Appeals on the same important matter. Braxton v. United States, 111 S.Ct. 1854, 500 U.S. 344 (1991). The issues attempted to be raised by the instant Petitioners are affirmative defenses, fact-sensitive issues and do not present an important legal proposition in

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[7] At least three (3) other failed legal challenges preceded this federal proceeding, as the school board has shown intransigence and "costing out" opponents for years.

dire conflict with another Court of Appeals. Affirmative defenses such as preclusion, abstention, mootness or other arguments in this case are used on a fact-sensitive basis and do not promote a particularly unique legal proposition and certainly no proposition which presents a Circuit conflict.

There is no conflict in the controlling law among the Circuits. Specifically, the cases to which the Petitioners cite for a mandate that the United States deccennial census figures be used for reapportionment is not the law. The cases to which the Petitioners refer are "cusp of the census" cases which are permissive rather than mandatory and allow for use of the prior deccennial census despite that a new deccennial census should be announced shortly.

As well, the District Court's choice of an Election Plan was a fact-sensitive inquiry supported by a several thousand page record and clear evidence of the population growth necessitating an appropriately chosen districting plan. Beginning with the case of Kirkpatrick v. Priesler, 394 U.S. 526, 535 (1969), this Court has permitted the use of expert calculations, predictions and estimations in population for redistricting purposes. See also, In Re: Pa. Congressional District Reapp. Cases, 535 F.Supp. 191, 192 (M.D. Pa. 1982) affirmed 463 U.S. 1219; David v. Cahill, 342 F.Supp. 463, 464 and 468 (D.N.J. 1972) affirmed Karcher v. Daggett, 462 U.S. 725, 738-40 (1983); Gaffney v. Cummings, 412 U.S. 735, 745-46 (1973)("... The United States census is more of an even than a process. It measures population only at a single instant in time. District populations are constantly changing ..."); In Re: Pennsylvania Congressional District Reapp. Cases 535 F.Supp 191 (M.D. Pa. 1982); Sincock v. Duffy, 215 F.Supp. 169 (D.Del. 1963) affirmed Roman v. Sincock, 377 U.S. 695 (1964) and Sincock v. Gately, 262 F.Supp. 739 (D.Del. 1967). Recent cases, as well recognize the limitations imposed by considering only the deccennial census. Abrams v. Johnson, 117 S.Ct. 1925, 1997 U.S. LEXIS 3863, *48-9 (1997); Wisconsin v. City of New York, 517 U.S. 1, 1996 U.S. LEXIS 1956, *8 (1996)(deccennial census is not absolute statement of population).

The Petitioners cite cases to this Court which permit use of a former United States Census to determine levels of population for an election until after the approval of the following deccennial census. Those cases are inapplicable on these facts as this case was properly reapportioning on strong evidence of current population which had not been accomplished or reviewed at all since the 1960's. The cases as cited by the Petitioners do not mandate use of the United States Census, but rather permit use as the evidence of population. In this case, there is no witness - either fact or expert - and no parties in these proceedings who has expressed the belief that population in the Chichester School District is more

accurately reflected by the 1990 census than interim estimates or the parties' expert analysis partially based on interim estimates. All parties and all experts have agreed in two (2) court systems that Upper Chichester has grown significantly since 1990. The District Court and the subsequent State Court choices simply recognized one could not ignore the addition and changes through and since 1990.

This is not a case of population differences between 1990 and 2000. This is a case where there is a difference in population between 1960 and the year 2000. Since it was determined that the equal protection clause was not met in 1997, it seems most appropriate to determine current population for apportionment. The Petitioners sought to apportion by mixing and matching municipalities in order to give the smaller municipalities greater voting strength. The most obvious solution was that suggested by the Respondents and chosen in state and federal trials which is: generally everyone in the courts agreed that the population of Upper Chichester is slightly greater than 66%. Dividing that population into three (3) equally populous regions for three (3) representatives each was not a difficult task. The Plans presented by the Respondents to both the lower federal and lower state courts wrote themselves.

Another reason for denying the Writ of Certiorari is that even if this Court were to hear the arguments and fully review the record to determine whether the two (2) lower courts had erred, in order for this Court to reverse the decision of the two (2) lower federal court's granting the Respondents relief, this Court would have effectively to reverse the March 13, 1998 Opinion and Order of The Honorable Joseph F. Battle. A true and correct copy of that Order and Opinion is attached to this Response as part of Appendix "1".

Given that the former school board members purposely and intentionally chose to litigate in 1998 with the federal Plaintiffs in State Court the issues that they had settled with Mr. DiMarco, there can be no mootness, abstention or other doctrine of bar with regard to the February 1997 Order reflecting a settlement between different parties. The March 1998 State Order reflects a decision between these parties after full trial.

This Court has affirmed the issue of using population evidence other than the decennial census for decades. This is a record sensitive decision. The record before the District Court was voluminous as was noted by the trial judge well as the Third Circuit Court of Appeals. There was overwhelming evidence as to the population increases and/or shifts since 1990. In fact, the former school board members' own expert evidence showed the growth in Upper Chichester as higher

than the Respondents' expert testimony. While a portion of the formula used by the Respondents' population expert included the use of census bureau interim estimates, there was a significant amount of other data used to confirm and/or form the opinion of Respondents' expert. That being so, and in the absence of mandatory legal direction that only the decennial census figures be used, the District Court and the Third Circuit Court of Appeals properly ruled.

The District Court properly acknowledged the representation on the Chichester School Board was unconstitutional and properly ordered constitutional elections with May 1998 primary. While courts may be reluctant to judicially review a legislative election plan, "...once a State's ... [election] scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan." Reynolds v. Sims, 377 U.S. 533, 585 (1964); Hellebust v. Brownback, 42 F.3d 1331, 1333 (10th Cir. 1994); Panior v. Iberville Parish School Board, 498 F.2d 1232, 1236 (5th Cir. 1974); David v. Cahill, 342 F.Supp. 463 (D.N.J. 1972). In Pennsylvania cases as well, the Pennsylvania Supreme Court in a per curiam decision of seven justices, subsequently cited with approval, stated:

> ...The objections raised to the reapportionment plan under consideration were all premised upon an implied assumption that the incumbent school directors had a legal right to serve out their elective terms. There is no constitutional ... basis for this assumption. The disappointment of an incumbent school director adversely affected by the new reapportionment plan is caused by the delay in adoption of that plan. Any further delay in the implementation of the present plan would be an intolerable erosion of the franchise of the voters in this school district which could not be tolerated.

In re: Reapportionment of the School District of the City of Pittsburgh, 507 Pa. 128, 488 A2d 1106, 1107-08 (1985). See also Lyons v. City of Pittsburgh, 586 A2d 469, 471 (1991); In re Pennsylvania Legis. Reapp. Commission, 609 A2d 132, 1992 Pa.LEXIS 279, *24-5 (1992)(holding public office is public trust without a private right).

Subsequent to the decision of the District Court but prior to the affirmance by the Third Circuit Court of Appeals the former school board members/Petitioners here filed the state court action for approval of a plan, including proposing for implementation the DiMarco settlement. While the

primary efforts of the former school board members were focused upon relitigating the DiMarco Plan for its implementation by the State Court, the State Court did hear evidence and did choose the Plaintiffs/Respondents' methodology, population figures and plan on current figures. In the interim, a State Court decision actually selected the Plaintiffs' plan used for the May 19, 1998 election. To address the challenges asserted by this Petition would be offensive to the doctrine of mootness as well as that established by Rooker-Feldman. Certiorari is inappropriate.

CONCLUSION

For the reasons given above, and for the reasons given in the Appellees' Brief in the Lower Courts, the Petition should be denied.

Dated:

Respectfully submitted,

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APPENDIX 1

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA
CIVIL ACTION - LAW

IN RE:	PETITION TO REAPPORTION THE SCHOOL DIRECTOR REGIONS OF THE CHICHESTER SCHOOL DISTRICT	: : : :	NO. 98-80044

ORDER

AND NOW, to wit, this thirteenth day of March, A.D., 1998 it is hereby ORDERED AND DECREED as follows:

1. The term of office of the current members of the Chichester School District Board of Directors shall terminate as of June 30, 1998.

2. The vacancies created pursuant to paragraph 1 of this order shall be filled at a special election to be held in conjunction with the May, 1998 primary election.

3. School district members so elected shall serve until the first Monday of December of 1999. Three directors shall be elected for each of three regions. The regions shall be as follows:

REGION 1	Upper Chichester Ward 1 Upper Chichester Ward 4 Upper Chichester Ward 5-1
REGION 2	Upper Chichester Ward 2 Upper Chichester Ward 3 Upper Chichester Ward 5-2
REGION 3	Marcus Hook Boro Trainer Boro Lower Chichester Township

4. Any and all candidates for the position of school directors to be elected in the special election shall file nomination papers with the Board of Elections on or before March 30, 1998. Persons submitting the nomination papers may be registered with a political party or as independents.

5. In the 1999 election, Region 1 shall have 1 person elected for a period of four years and two persons

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elected for a period of two years; Region 2 shall have two persons elected for a period of four years and one person elected for a period of two years; Region 3 shall have two persons elected for a period of four years and one person elected for a period of two years. Thereafter, all persons elected shall be elected for a term of four years.

BY THE COURT:

JOSEPH F. BATTLE, J.

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA

CIVIL ACTION - LAW

IN RE:	PETITION TO REAPPORTION THE SCHOOL DIRECTOR REGIONS OF THE CHICHESTER SCHOOL DISTRICT	: : : :	No. 98-80044

Terry Elizabeth Silva, Esquire,
1429 Walnut Street, Suite 900, Phila., PA 19102

Peter L. Frattarelli, Esquire,
One Commerce Square, 2005 Market Street, 37th Floor,
Phila., PA 19103

Arthur Levy, Esquire,
344 W. Front Street, P.O.Box 319, Media, PA 19063

Michael I. Levin, Esquire,
1402 Masons Mill Business Park, 1800 Byberry Road,
Huntingdon Valley, PA 19006

Francis P. Connors, Esquire,
Delaware County Court House, Solicitor's Office,
Media, PA 19063

O P I N I O N

J. BATTLE DATE:

The Chichester School District is governed by the Chichester School Board, which is comprised of nine incumbent school directors who were elected from nine individual regions within the school district. Each region elected one school director. Over a number of years there have been various petitions filed to re-apportion the school board pursuant to provisions contained within the Pennsylvania Public School Code, 24 P.S. §3-303. The various petitions for re-apportionment basically alleged that, because the populations of each of the nine regions were not equal or nearly equal in number, there was a violation of the

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Pennsylvania Public School Code which provides that the electoral regions be as nearly equal as possible. 24 P.S. §3-303(b)(3). Pursuant to the petition for re-apportionment which was filed at #96-4938, the parties to that petition for re-apportionment agreed upon a settlement, which was approved by this court by an order dated August 16, 1996. The parties agreed that the settlement remedied the violation of the Public School Code requiring that the directors be elected from regions of nearly equal population. Under the terms of that settlement, the nine regions were to be replaced by three regions of approximately equal populations and three school directors would be elected from each of the three regions. Under the terms of the settlement, the new arrangement would not be fully implemented until 1999. All incumbent school directors would have been permitted to serve-out their full terms.

Thereafter, various individuals filed an action in the United States District Court for the Eastern District of Pennsylvania wherein it was averred that the settlement approved by this court by the order dated August 16, 1996 was in violation of the Public School Code and, further, was in violation of the Fourteenth Amendment of the United States Constitution which provides for the principle of "one man - one vote". The Honorable Senior Judge John P. Fullam, of the United States District Court for the Eastern District of Pennsylvania, entered a Memorandum and Order on September 10, 1997 in which it was found that the settlement approved by this court by its order dated August 16, 1996 does infringe the rights guaranteed citizens by the United

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States Constitution. More specifically, the Judge noted that the populations of the three regions approved pursuant to the order, were determined based upon the 1990 United States Census. Because of significant population shifts which have occurred since the 1990 Census, Judge Fullam determined that the use of the 1990 census figures is no longer valid. Further, Judge Fullam determined that continuing to permit the current school directors to remain until 1999, since they were elected in violation of the "one man-one vote" principle, is constitutionally impermissible. Finally, Judge Fullam determined that a three region plan was superior to an at-large plan as had been proposed by certain parties. Thereafter, Judge Fullam heard testimony in regard to tri-regional plans which were proposed by the parties. Judge Fullam heard testimony relative to the populations of each region proposed by each party and, after hearing such testimony, Judge Fullam found that the testimony of Dr. Cupingood relative to populations was persuasive and that the two plans submitted by the plaintiffs in the federal court action met Pennsylvania state law requirements and federal constitutional requirements. Judge Fullam found that the plan submitted by the Chichester School District did not meet constitutional requirements. Therefore, Judge Fullam entered an order which directed, in relevant part, as follows:

1. That both of the tri-regional plans submitted by the federal plaintiffs relative to the election of the school board members met Pennsylvania state law and federal constitutional principles.

2. The tenure in office of all present

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members of the school board be terminated as of June 30, 1998 and that the vacancies thus created be filled at a special election to be held in conjunction with the May, 1998 primary election.

3. That the school directors elected at the May, 1998 primary be in accordance with the primary plan submitted by the federal plaintiffs unless the Court of Common Pleas of Delaware County approves the federal plaintiffs' alternate plan or some other plan that meets all constitutional and statutory requirements and, further, that the plan be implemented by a valid special election to be held in conjunction with the May, 1998 primary election.

The majority of the directors of the Chichester School District caused the current petition to be filed with this court in an effort to have this court approve a plan other than the primary plan submitted by the federal plaintiffs which was approved by Judge Fullam. The majority of the school directors have proposed three different plans to this court. The first plan uses the 1990 census data, only, in determining population figures of the three regions. Judge Fullam has already determined that, because of significant population shifts within the school district, the use of the 1990 census population figures results in an unconstitutional plan. Therefore, this plan must be rejected. This court adopts the reasoning of Judge Fullam in rejecting any plan which is based upon the 1990 census figures. The evidence has established that there has been too great of a shift of population since the 1990 census. The second plan proposed by the majority of the school board members took the 1990 census figures and updated

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those figures based upon building permits and construction since the 1990 estimate. The third plan proposed by the majority of the school board directors basically accepted the population figures as determined by Dr. Cupingood, with some alteration. In response to the petition of the majority of the members of the school board to approve a plan other than that approved by Judge Fullam, the federal plaintiffs proposed three plans. The first plan is the primary plan which had been approved by Judge Fullam. Their second plan is the alternate plan which had been approved by Judge Fullam. The third plan is, basically, the same as the third plan submitted by the majority of the members of the school board, amended by switching the precincts of ward 5 so that precinct 5-1 is combined with wards 4 and 8 and that precinct 5-2 is combined with wards 2 and 3. The federal plaintiffs argued that by switching these precincts there was better equality in the populations of the regions and, further, that the only area of the school district which has any significant minority population would be maintained in one voting region as opposed to broken up into two voting regions.

The parties to this action have not agreed upon the population figures for the various regions of each side's proposals. The school board presented the federal court transcript testimony of Ronald Uroda who is a demographic services co-ordinator for the Pennsylvania State Data Center, which is part of Penn State University. In addition to the transcript testimony of Dr. Uroda, the school board presented the testimony of the school

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district superintendent, Dr. Salvatore J. Illuzzi. The federal plaintiffs presented the federal transcript and live testimony of Dr. Leonard A. Cupingood, who has an M.A. and Ph.D. in statistics from Temple University. Certainly, all of the persons presented through transcripts and live testimony relative to the determination of the populations of the various proposed regions are intelligent, well educated individuals. These men have not agreed upon the appropriate method of determining the populations of the various regions. Judge Fullam noted that the school district's plans were based upon the population estimates of Mr. Illuzzi, as checked and approved by Mr. Uroda. Judge Fullam believed that the methodology of Dr. Illuzi and Mr. Uroda is not likely to have been as accurate as the methodology of Dr. Cupingood. This court agrees with Judge Fullam. In respect to the second plan submitted by the school board, the school board has taken the 1990 census figures and made its own adjustments to account for post-1990 changes in population. The federal plaintiffs' expert used the 1996 census update to the 1990 census figures and, thereafter, made adjustments for additional population changes. This court believes that the use of the United States census figures would provide more consistent, accurate determinations of population than will reviewing building permits, cable television subscriptions, and voter registrations as has been done by the school board. Further, while it is evident that Dr. Illuzzi is a dedicated public servant who has devoted a great deal of time to determining populations of the various regions, Dr.

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Illuzzi is not a trained expert in this field and he has used different bases upon which to determine new population figures at different times. More specifically, he has used different multipliers to be applied to building permits to determine new population figures at different times. Therefore, this court agrees with Judge Fullam that the methodology of Dr. Cupingood is preferable to that of the school board to determine population.

Having determined that Dr. Cupingood's methods are the superior methods for determining population, and having further determined that the school board's first proposal is not constitutional because it uses the 1990 census figures, only, and that the second proposal is based upon a less accurate method to determine population figures for the various regions than Dr. Cupingood's method, the school board's first two re-apportionment plans must be rejected. Therefore, this court is left with determining whether the third plan proposed by the school district, the primary plan of the federal plaintiffs, the secondary plan of the federal plaintiffs, or the additional plan of the federal plaintiffs (which is essentially similar to the third plan of the school board) should be the plan implemented.

It has already been determined by Judge Fullam that the plaintiffs' primary plan and secondary plan meet constitutional principles of one man - one vote. The attorneys for the federal plaintiffs have stipulated to this court that the third plan submitted by the school district, when precincts 8-1 and 8-2 are switched as aforesaid, also meets the constitutional principles of

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one man - one vote and the Pennsylvania School Code requirements that the regions be as equal as possible in population.

The third plan submitted by the school board and the alternate plan submitted by the federal plaintiffs, which is essentially the school board's third plan with precincts 5-1 and 5-2 switched, are also subject to a review based upon the methodology for determining the populations of the various regions. Again, this court accepts the methodology of Dr. Cupingood over that proposed by Dr. Illuzzi. Dr. Illuzzi is the only person on behalf of the school board who addressed the issue of the populations for the school board's third plan. Mr. Uroda did not address the third plan. Again, this court accepts Dr. Cupingood's methodology over Dr. Illuzzi's. Dr. Cupingood's methodology has been consistent and is persuasive. Dr. Illuzzi, while certainly striving to meet the principles of one man - one vote, is not an expert in the field of statistics or population estimates. The switch of the precincts 5-1 and 5-2 appears rational under Dr. Cupingood's testimony. The switch was based upon a development known as "Lutheran Knolls" and 51 other taxable properties which were switched to ward 5 from ward 4 in 1993. If Dr. Illuzzi's rationale for determining populations in respect to these wards is to be accepted, it would require that the 51 single family houses were not occupied as of the date that the boundaries were re-drawn. By switching these precincts there is a regional plan as follows:

REGION	MIDDLE DISTRICTS		POPULATION
I.	Upper Chichester	Ward 1	2,911
	Upper Chichester	Ward 4	3,784

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	Upper Chichester	Ward 5-1	1,641
			TOTAL: 8,336
II.	Upper Chichester	Ward 2	3,166
	Upper Chichester	Ward 3	3,609
	Upper Chichester	Ward 5-2	1,502
			TOTAL: 8,277
III.	Marcus Hook Boro, Trainer Boro and Lower Chichester Twp.		8,328

The federal plaintiffs have agreed that the school board's plan 3, with the switching of precincts 5-1 and 5-2, meets federal constitutional principles of "one man - one vote" and Pennsylvania statutory requirements that the regions be as nearly equal as possible. Further, as Judge Pullam noted in his opinion of January 30, 1998, population variations in excess of 10 % are generally unacceptable. Where the deviation is 10% or less, a reapportionment plan is generally acceptable, unless it is the product of racial gerrymandering or other "political" considerations. Ram, Raly vs. Hunt, 93 F.3d 1212 (4th Cir. 1996). The school board plan, with the switching of wards 5-1 and 5-2 of Upper Chichester Township, (also known as the federal plaintiffs additional plan), meets the constitutional requirement of one man-one vote and the Pennsylvania statutory requirements that the regions be as nearly equal as possible. Further, this plan maintains the minority populations of the school district all within one region. The majority of the members of the school board have argued that this racial consideration is inappropriate,

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and, in support of the argument, have cited Shaw vs. Hunt, 116 S. Ct. 1894 (1996); and Miller vs. Johnson, 115 S.Ct. 2475 (1995). However, so long as race does not predominate as a districting principle, there cannot be a claim of improper racial considerations. If race is not the predominate and over-riding consideration, then there is no improper consideration of racial make-up in the community. See, Lawyer vs. Department of Justice, 117 S. Ct. 2186 (1997); and Abrams vs. Johnson, 117 U.S. 1925 (1997). State action based partly upon considerations of color when color is not used per se, and in furtherance of a proper governmental objective, is not a violation of the Constitution. See, Spencer vs. Kugler, 326 F.Supp. 1235 (1971). A re-apportionment plan which satisfies the initial constitutional requirement of population equality may never the less be constitutionally infirm if the boundaries operate to the disadvantage of an identifiable protected class. Where boundaries function to either "fence out" a protected group or to cancel or minimize its voting strength, the plan violates the equal protection clause of the Fourteenth Amendment of the United States Constitution and must fail. Evidence that planners considered existing political sub-divisions, or natural or historical boundary lines, does not, without more, establish an equal protection violation. See, In re: Ross Township, 489 A.2d 297 (1985); and In re: Pennsylvania Congr. Districts re-apportionment, 535 F.Supp. 191 (M.D.Pa. 1982). Effectuating adequate representation of a

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minority group is lawful in a re-apportionment plan. See, Mellow vs. Mitchell, 530 Pa. 44, 607 A.2d 204 (1992).

The third plan of the school district, with the aforesaid precinct switches, which is also known as the federal plaintiffs additional plan, is not a plan upon which racial gerrymandering was a primary consideration in developing the plan. The primary consideration in developing the plan was to make the regions as equal as possible. This was the school board's plan. The testimony of Dr. Cupingood has been accepted by this court and, therefore, the school board's third plan had to be revised by switching the aforesaid precincts in order to make the populations as nearly equal as possible. By doing so, the minority populations of the school district just happen to all be within one region. This court believes that uniting the minority population within one region will benefit the community. Members of the community testified before this court indicating that they desire to have the minority population within one region. Further, while this court does not believe that members of a minority will vote in a united front or will all have the same concerns relative to the governing of the school district, certainly there may be some similar concerns in certain areas among the minority community which, if the minority population is within one region, may result in an enhanced ability of the minority population to have their elected school board members to address the concerns with the full school board. This plan is the only plan which meets the constitutional and statutory requirements of reorganization and also unites the

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minority community in one voting region. Therefore, this plan shall be approved.

The solicitor for the Delaware County Board of Elections, Francis P. Connors, Esquire, has brought to the attention of this court the fact that Judge Fullam did not address the method by which the directors would be elected in conjunction with the May primary. Therefore, this court will address the concerns of the Board of Elections in the order implementing the special election.

BY THE COURT:

JOSEPH F. BATTLE, J.

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APPENDIX 2

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GEORGE JAMES, et al.	:	CIVIL ACTION
v.	:	NO. 96-7683
CHICHESTER SCHOOL BOARD, et al.	:	
SANTA FRATTARELLI, et al.	:	CIVIL ACTION
v.	:	NO. 97-1663
JOSEPH P. KELLY, et al.	:	

MEMORANDUM AND ORDER

Fullam, Sr. J. March 4, 1998

The defendants have filed a motion for a stay of this Court's Order dated January 30, 1998, pending appeal to the Third Circuit Court of Appeals from that order. The motion will be denied.

Throughout this litigation, it has been conceded by all parties that the nine incumbent school directors of the Chichester School District were elected in violation of the one man-one vote requirements of the United States Constitution (and also in violation of the Pennsylvania School Code). The only disputes, either in this litigation or in the related state court litigation, concern the method of correcting the irregularity, and the timing of the corrective measures.

The defendants, unfortunately, seem determined to postpone the necessary corrective measures as long as possible,

ENTERED: 3/5/98

Exhibit "D"

CLERK OF COURT

and to prolong the tenure in office of those school directors who support the current administration of the schools, at the expense of the constitutional rights of the voters.

The parties to the earlier state court litigation (not including the plaintiffs in the cases in this court) agreed upon a redistricting plan which violated both the Constitution and state law (the regions were almost certainly not equal in population, and the districts were not contiguous). It was to prevent the implementation of that plan that the current litigation in this court was instituted.

The January 30, 1998 Order, which defendants now seek to stay, merely requires that the constitutional violations be remedied promptly by means of a special election to be held in conjunction with the May 1998 primary. Throughout the hearing in this court, plaintiffs wanted an earlier special election, and it was the defendants who insisted that the election should take place at the May primary. At no time have the defendants ever sought to justify the continued tenure in office of the incumbent school directors beyond the date when their successors could feasibly be constitutionally chosen.

In order to obtain a stay, defendants are required to make a clear showing that there is a substantial likelihood that the injunction would be vacated on appeal, that they will suffer irreparable injury in the absence of a stay, that their opponents will not suffer serious injury if a stay is granted, and that the

public interest would best be served by a stay. Defendants, in my view, fail to meet any of these requirements.

Since there is no dispute about the current constitutional violations, defendants will be hard-pressed to establish on appeal that the violation should not be remedied promptly. The Order appealed from does not mandate a particular redistricting plan; it merely declares that either of the two plans submitted by the plaintiffs would pass constitutional muster. The parties are enjoined to implement the "primary plan" submitted by plaintiffs unless the state court approves some other constitutionally-acceptable plan for timely implementation.

It is indeed difficult to perceive any detriment to the defendants if a stay is denied. They have no valid interest in delaying corrective action, nor do they have any legitimate interest in evading constitutional requirements through gerrymandering for the protection of incumbents. The state court is free to adopt any constitutionally-valid plan the defendants submit; this Court's January 30th Order does not tell the state court what to do, but merely provides an alternative to further litigation of the matter, if the state court prefers that route.

The Motion for Stay will be denied.

An order follows.